

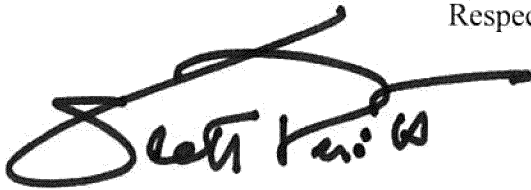
regulation that was in place prior to issuance of the Clean Water Rule and that is being implemented now under the U.S. Court of Appeals for the Sixth Circuit's stay of that rule. Second, the agencies plan to propose a new definition that would replace the approach in the 2015 Clean Water Rule with one that reflects the principles that Justice Scalia outlined in the *Rapanos* plurality opinion.

The federalism consultation for the new definition began with an initial meeting held April 19, 2017, with state and local government associations. In addition to discussions our respective staffs will have with associations and individual state environmental agencies, we are reaching out to you directly to ensure we receive the benefit of your particular state's experiences and expertise. The agencies are soliciting written comments from state and local governments until June 19, 2017. Enclosed is a PowerPoint presentation that provides brief background information on the process the agencies intend to follow, identifies some questions we are hoping states can help us answer, and includes instructions for providing us with your comments.

Cooperative federalism is a guiding principle for us. We want to clearly understand what definition will work best for your state as we develop a new federal definition of "waters of the United States" consistent with the Scalia opinion. In addition, we are interested in understanding how your state might respond to a reduced scope of federal jurisdiction under the Clean Water Act.

If you or your staff have further questions, please feel free to contact Donna Downing at (202) 566-2428 or [CWAwotus@epa.gov](mailto:CWAwotus@epa.gov), or Stacey Jensen at (202) 761-5856 or [stacey.m.jensen@usace.army.mil](mailto:stacey.m.jensen@usace.army.mil).

Respectfully yours,



Scott Pruitt  
Administrator  
Environmental Protection Agency



Douglas W. Lamont, P.E.  
Senior Official Performing  
the Duties of the Assistant  
Secretary of the Army  
(Civil Works)

# The Definition of “Waters of the U.S.”

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E.O. 13132 Federalism Consultation Meeting

April 19, 2017

# Purpose & Agenda

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## Purpose:

- Initiate Federalism consultation to obtain state and local government officials' perspectives
- Provide an overview of potential changes under consideration for the definition of "Waters of the U.S."

## Agenda:

- Federalism overview
- "Waters of the U.S." over time
- The Executive Order
- Proposed two-step process
  - Step 1
  - Step 2
- Discussion of Potential Approaches
- Next steps

# E.O. 13132, Federalism

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The Order requires that Federal agencies consult with elected state and local government officials, or their representative national organizations, when developing regulations that have federalism implications.

The agencies are consulting due to strong interest on the part of state and local governments on this issue over the years and potential effects associated with a change in the definition of “waters of the U.S.”

# “Waters of the U.S.” Over Time

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From the 1970s through the 1990s, the majority of federal courts, as well as the agencies, consistently interpreted a broad scope of Clean Water Act jurisdiction.

Supreme Court decisions in 2001 and 2006 held that the scope of navigable waters must be linked more directly to protecting the integrity of waters used in navigation. The justices in the 2006 *Rapanos* decision were split on how this was to be accomplished.

The agencies have been working since these Supreme Court decisions to provide clarification and predictability in the procedures used to identify waters that are – and are not – covered by the Clean Water Act.

The 2015 Clean Water Rule was an effort to provide that needed clarification and predictability. Many stakeholders, including many states, expressed concerns with the 2015 Rule.

The agencies are now embarking on another effort to provide clarity and predictability to members of the public.

# The Executive Order

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On February 28, 2017, the President signed the “Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.”

The E.O. calls on the EPA Administrator and the Assistant Secretary of the Army for Civil Works to review the final Clean Water Rule and “publish for notice and comment a proposed rule rescinding or revising the rule....”

The E.O. directs that EPA and the Army “shall consider interpreting the term ‘navigable waters’” in a manner “consistent with Justice Scalia’s opinion” in *Rapanos*. Justice Scalia’s opinion indicates CWA jurisdiction includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters.

<https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic>

# Two-Step Process

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The agencies are implementing the Executive Order in two steps to provide as much certainty as possible as quickly as possible to the regulated community and the public during the development of the ultimate replacement rule.

1. The agencies are taking action to establish the legal status quo in the Code of Federal Regulations, by recodifying the regulation that was in place prior to issuance of the Clean Water Rule and that is being implemented now under the U.S. Court of Appeals for the Sixth Circuit's stay of that rule.
2. The agencies plan to propose a new definition that would replace the approach in the 2015 Clean Water Rule with one that reflects the principles that Justice Scalia outlined in the *Rapanos* plurality opinion.

The agencies are aware that the scope of CWA jurisdiction is of intense interest to many stakeholders and therefore want to provide time for appropriate consultation and deliberations on the ultimate regulation.

In the meantime, the agencies will continue to implement regulatory definition in place prior to the 2015 rule, consistent with the 2003 and 2008 guidances, in light of the *SWANCC* and *Rapanos* decisions, pursuant to the Sixth Circuit stay of the Clean Water Rule.

# Step 1: Withdraw 2015 Clean Water Rule

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While the Sixth Circuit stay may remain in effect for some time, its duration is uncertain.

To provide greater certainty, the agencies will move to reinstate the preexisting regulations and guidance and to withdraw the 2015 Rule.

In the Step 1 proposed rule, the agencies will define “waters of the United States” using the regulatory definition in place before the Clean Water Rule, which the agencies will continue to implement according to longstanding practice, just as they are today.

The Step 1 proposed rule would maintain the approach in place for decades until a revised rule with a new definition can be promulgated.

# Step 2: Develop New Rule Consistent with the Executive Order

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The E.O. directs the agencies to consider interpreting the term “navigable waters,” as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).

Justice Scalia’s opinion indicates Clean Water Act jurisdiction includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters.

The agencies are consulting with state and local government officials as we begin to develop the new definition.

# Potential Approaches to “Relatively Permanent” Waters

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Perennial plus  
streams with  
“seasonal” flow

Current practice:  
seasonal flow =  
about 3 months  
(varies  
regionally)

Perennial plus  
streams with another  
measure of flow

Use appropriate,  
implementable  
metrics, e.g.,  
frequency of flow,  
intersecting water  
table

Perennial streams  
only

Streams  
that carry flow  
throughout the  
year except in  
extreme drought

Other

Thoughts?